Supreme Court, U. S.
FILED
DEC 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-339

BUFFALO FORGE COMPANY,

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO; I. W. ABEL AS INTERNATIONAL PRESIDENT; MITCHEL F. MAZUCA, IND. AND AS DISTRICT DIRECTOR; JOHN GRUKA, IND. AND AS INTERNATIONAL REPRESENTATIVE OF UNITED STEELWORKERS OF AMERICA, AFL-CIO;

LOCAL UNION NO. 1874 OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO; VALENTINE F. ZIZZI, IND. AND AS PRESIDENT; VALENTINE OLEJNICZAK, IND. AND AS VICE PRESIDENT OF LOCAL UNION NO. 1874 OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO;

LOCAL UNION NO. 3732 OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO; KERMIT HASELEY, IND. AND AS PRESIDENT; AND ALFRED LIGAMMARI, IND. AND AS VICE PRESIDENT OF LOCAL UNION NO. 3732 OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO;

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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BUFFALO FORGE COMPANY,

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UNITED STEELWORKERS OF AMERICA, AFL-CIO, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 517 F. 2d 1207 and is reprinted at App.A, pp. 1a-9a, to the Petition herein. The opinion of the United States District Court for the Western District of New York is reported at 386 F.Supp. 405 and is reprinted at App.B, pp. 10a-19a, to the Petition herein.*

* The opinions of the Courts below are printed as appendices to the Petition herein and are not separately printed in the Single Appendix. References to the Single Appendix are designated "A. ....."

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on May 1, 1975. On September 2, 1975, the Petition herein was filed and was granted on October 20, 1975.

Question Presented

If a union which represents one employee bargaining unit, and the employer, enter into a binding collective bargaining agreement that contains both a mandatory arbitration procedure to resolve disputes between the employer and the union arising out of the agreement, and an unequivocal "no strike" pledge, but the union orders employees in this bargaining unit to stop work and to honor a strike and picketing established by the same union, on behalf of another bargaining unit of employees employed by the same employer at the same facility, does a federal district court have the authority under § 301 of the Labor Management Relations Act to enjoin the union's sympathy strike conduct and to compel arbitration of the dispute as to whether the union's conduct violates the collective bargaining agreement?

Statutes Involved

This case involves § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, as well as § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a). These provisions are set forth at App.A, pp. 2a, 3a, footnotes 1 and 2, of the Petition.

Statement of the Case

Federal Jurisdiction

The Buffalo Forge Company, petitioner, pursuant to § 301 of the Labor Management Relations Act (29 U.S.C. § 185), brought this action against the United Steelworkers of America ("International Union"), two affiliated local unions and various officers and agents of those labor organizations, for compensatory damages and other relief, including injunctive relief and an order directing arbitration, as a result of the unions' alleged breach of no strike clauses contained in an effective collective bargaining agreement, which was binding on all the parties to this litigation (A. 2-13).

Statement of Facts

The Company is engaged in the manufacture and sale of pumps and air handling equipment at three separate plants and office facilities in the Buffalo, New York area. For many years, the International Union and its affiliated locals 1874 and 3732 have represented the Company's production and maintenance employees under successive collective bargaining contracts (App.A, p. 5a; App.B, p. 12a). The current contract, by its terms, remained in full force and effect until September 28, 1975 (A. 21).

The International Union and two other affiliated local unions (not parties to this action) represent the Company's office clerical and technical employees who are employed at the Company's three Buffalo area facitilies (App.A, p. 5a). On November 16, 1974, in negotiating their first agreement with the Company, the International Union and the office-technical local unions struck the Company and established picket lines at all three of the Company's Buffalo area facilities (App.A, p. 5a). That strike and picketing by the International Union and the office-technical locals are bona

fide, primary and legal, and are continuing (A. 24-25; App.A, pp. 5a-6a).

On November 18, 1974, the production and maintenance employees at one of the plants refused for the day to cross the picket lines there. On November 20, 1974, the Company learned that a production and maintenance employee work stoppage at all three plants was scheduled by the respondent unions for the following morning. The Company sent telegrams to officers of the unions, which set forth the Company's position that a work stoppage would be in violation of the collective bargaining agreement, and offered to arbitrate any dispute involved (A. 22-23; App.B, p. 16a).

From November 21 through December 15, 1974, at the admitted direction and instruction of the International Union, the local unions and the production and maintenance employees honored the picket lines and engaged in a work stoppage at all three of the Company's plant facilities (A. 25; App.B, p. 16a). Manufacturing operations at the Company's three plants were completely halted (App.B, p. 13a). The production and maintenance employees returned to their jobs on Monday, December 16th; the next regular work day after the district court issued its Decision and Order denying the Company's request for a preliminary injunction (App.A, p. 5a).

At all times material herein, labor agreements covering the production and maintenance employee bargaining units were in effect (A. 25). The agreements are between the Company and United Steelworkers of America, AFL-CIO, on behalf of itself and members of the local unions (A. 13-14). The collective bargaining agreements are valid and apply to the dispute herein (A. 25). These agreements are signed by representatives of both the International and local unions, as well as the Company (A. 21-22).

The agreements contain a detailed grievance procedure and a broad-scope arbitration clause which mandates final and binding arbitration for "differences . . . between the Company and any employee covered by this Agreement as to the meaning and application of the . . . Agreement or . . . trouble of any kind [arising] in the plant." (A. 17-20). The intention to achieve and maintain responsible relationships between the Unions and the Company is also underscored in the first section of the Agreement (A. 14-15).

Not only does the grievance-arbitration clause expressly mandate recourse to its dispute settlement procedures rather than work stoppages (A. 17), but the responsibilities of the Unions and the employees not to engage in strike, work stoppages or "any such activities" are expressly delineated in a section entitled "Responsibilities of the Parties" (A. 15-16).

Additionally, the Agreements establish the regular work schedules of employees (A. 16-17); and, in addition to a "Management Rights" clause (A. 20), expressly reserve management's rights to notify employees not to report for work (A. 17).

The Proceedings Below

The District Court denied the Company's application for a temporary restraining order and a preliminary injunction and an arbitration order. The Court held that it was deprived of jurisdiction by § 4 of the Norris-LaGuardia Act to grant an injunction against the work stoppage generated by the defendant unions' order to their members to observe picket lines established by the International Union and two other subordinate local unions. The principal basis for that holding was the Court's conclusion that no "Boys Markets" injunction could issue against the work stoppage because it was not a strike "over an underlying grievance".

On appeal, the Court of Appeals affirmed the District Court's order on May 1, 1975, principally because the Court interpreted prevailing federal labor policy as permitting injunctions "only" against strikes which were "over" an arbitrable grievance raised by unions or employees under a collective bargaining agreement.

Summary of Argument

This case raises important questions concerning the interplay between § 4 of the *Norris-LaGuardia Act* and § 301 and § 203(d) of the *Labor-Management Relations Act*. The issues are presented in the context of a "sympathy" work stoppage which was initiated by the respondent unions during the term of an effective labor agreement which contained a broad, mandatory arbitration procedure and an expressed, unequivocal no-strike obligation.

The ban on judicial interference in strikes arising from labor disputes was intended to promote the institution of collective bargaining. § 4 of *Norris-LaGuardia* does not invariably bar injunctive relief and that Act in any event, has not been interpreted and applied as an isolated factor of federal labor relations policy.

Federal labor relations policy is completely effectuated when the collective bargaining agreement contains both a provision for arbitration of disputes and an absolute prohibition of strikes. The parties' agreement, here, is such agreement; the result of the encouragement and promotion by statute and the substantive law developed under § 301. However, the Court of Appeals for the Second Circuit has denied the Company effective and swift enforcement of the no-strike obligation, although the Court would grant the Union specific performance of the agreement to arbitrate. Contrary to the principles established under § 301 litigation, the Appellate Court has adhered more to the analysis of *Sinclair*, which has been soundly rejected by this Court in its decision in *Boys Markets*, and more recently, in *Gateway* and *Arnold v. Carpenters*. A literal reading and application of *Norris-LaGuardia* defeats one of the core purposes of federal regulations and impairs the requirement that collective bargaining agreements be equally binding and enforceable on both labor and management. It is the role of the judiciary to enforce these negotiated agreements on behalf of, as well as against, labor organizations to secure industrial peace.

Statute and the decisions of this Court have protected and enforced the sanctity of the collective bargaining agreement. These obligations, although contained in private labor relations agreements, are as enforceable as the similar statutory provisions of the *Railway Labor Act*. In the latter case, despite § 4 of *Norris-LaGuardia*, the no-strike obligation was enforced and the parties' disagreement was routed to the arbitration procedure endorsed by the statute.

The well-known presumption of arbitrability of labor disputes arising under labor contracts has been uniformly applied in favor of arbitration; yet, the Court of Appeals has presumed that the contract dispute over the scope of the contractual no-strike clause, which arose between these parties, was not arbitrable. That determination directly conflicts with the decisions of this Court which apply that presumption whether the 301 litigation was one for damages or equitable relief. A contrary result cannot be justified under any principles of fundamental fairness or mutuality of remedy.

The scope of the agreement to arbitrate and the contractual no-strike obligation are matters of contract and disputed application of such agreements are matters of contract interpretation to be resolved by arbitration, unless the contract expressly negates such an obligation. In the instant case, the parties' agreement contains a broad-scope arbitration clause which certainly covers the underlying dispute. Until the par-

ties have resolved that dispute through contractually agreed-upon procedures, the union has no equitable or legal standing on which to insist that it is being stripped of its strike weapon without justification; especially since the remedial injunction merely enforces that to which the union has already agreed. Although *Boys Markets* literally involves a strike over a grievance, the policy reasons favoring the availability of injunctive relief are equally compelling in this case.

ARGUMENT

I. The Court of Appeals incorrectly construed and applied federal labor policy in conflict with decisions of this Court.

In the circumstances of this case, the decision of the Court of Appeals that federal labor policy favoring arbitration and industrial disputes pertaining to the interpretation and application of collective bargaining agreements does not support enforcement of an express no-strike obligation conflicts with the basic principles enunciated in applicable decisions of this Court.

A. Federal Policy Encourages Arbitral Settlement of Industrial Disputes through Enforcement of Labor Agreements

Congress passed the *Norris-LaGuardia Act* in 1932, as a reaction to the wide-spread misuse by federal courts of injunctions in certain labor-management controversies. The Act prohibited federal courts from issuing injunctions in "labor disputes" and provided strict procedural safeguards in those cases wherein injunctions were appropriate.[1] The wording of

[1] 29 U.S.C. §§ 107-112. *Emery Air Freight Corp. v. Local 295 Teamsters*, 449 F.2d 586 (2d Cir. 1971); Cert. denied 405 U.S. 1006.

the Act itself reveals that the core purpose of the Statute was to eliminate jurisdiction of the federal courts over *lawful* strikes in labor disputes. Injunctions are still appropriate when "unlawful acts have been threatened . . . or have been committed . . ."[2]

The Court of Appeals, below, and the Courts of Appeals for the 5th, 6th and 7th Circuits[3] have erroneously concluded, in the circumstances of this case, that §4 of *Norris LaGuardia* remains the dominant policy of federal labor regulatory scheme despite the subsequent enactment of the *Labor-Management Relations Act* and the subsequent determinations of this Court that §4 of *Norris-LaGuardia* must be accommodated with the core purposes of §301 of the later enactment, so that "the obvious purpose in the enactment of each is preserved."[4] This accommodation requires "only that the anti-injunction policy of *Norris-LaGuardia* not intrude into areas, not vital to its ends, where injunctive relief is vital to a purpose of §301; it does not require unconditional surrender".[5]

As we show under Point II, no such "unconditional surrender" is proposed or will result from a grant of the relief requested by petitioner, notwithstanding the Court of Appeals expressed concern that it is "difficult to conceive of any strike which could not be enjoined" (App.A, p. 8a).

[2] 29 U.S.C. §107(a). See also Representative LaGuardia's remarks, 75 Cong. Rec. 5478-79 (1932).

[3] See *Amstar Corporation v. Amalgamated Meatcutters & Butcher Workmen*, 468 F. 2d 1372 (5th Cir. 1972); *Plain Dealer Publishing Co. v. Typographical Union No. 53 et al.*, 520 F. 2d 1220 (6th Cir. 1975), *petition for cert. filed* (U.S. Oct. 2, 1975—No. 75-565); *Hyster Co. v. Independent Towing and Lifting Machine Association* 519 F. 2d 89 (7th Cir. 1975); but cf. *Inland Steel Co. v. Local 1545 UMWA* 505 F. 2d 293 (7th Cir. 1974).

[4] *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 217 (1962) (Brennan J., dissenting).

[5] Id. at 225.

As evidenced by the passage of the *Labor Management Relations Act*, in 1947, a federal policy had emerged "to encourage settlement of labor disputes through enforcement of compulsory arbitration agreements" *Avco Corp. v. Local 787*, 459 F. 2d 968, 970 (3d Cir. 1972); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962). Section 203(d) of that Act provided that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement".[6]

Section 301(a) of that Act granted federal courts jurisdiction over "suits for violation of contracts between an employer and a labor organization".[7]

In the twenty-seven years since these statutes were enacted, this Court has formulated an expansive body of federal labor relations law, grounded upon the basic statutory premise that industrial stability is best fostered by the substitution of arbitration for strikes.

In 1957, this Court upheld the jurisdiction of the federal courts, under §301, to specifically enforce an arbitration agreement contained in a collective bargaining agreement. The Court, in *Lincoln Mills*, concluded that §301 was intended by Congress as a remedy for the violation of no-strike agreements and that arbitration agreements were the *quid pro quo* for such no-strike agreements.[8]

In *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) this Court ruled that Federal courts should order specific performance of arbitration agreements even where the grievance involved the contracting out of

[6] 29 U.S.C. §173(d).

[7] 29 U.S.C. §185(a).

[8] *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

work and the contract excluded from arbitration matters which were strictly a function of management. The Court announced a broad presumption in favor of arbitration.

In *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), this Court ruled that when parties had agreed to submit all questions of contract interpretation to the arbitrator, the function of the court is limited to determining whether the claim on its face is governed by the contract. In such cases, the courts should not weigh the merits but refer the contractual claims to arbitration.

In these two cases as in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) this Court, in conformity with the statutory mandate, established arbitration as the keystone of Federal labor policy. In each case, this Court indicated that its decisions were based on the contractual consent of each of the parties to utilize arbitration to settle specific disputes. Arbitration cannot be imposed on parties who have not bargained for and accepted it. Thus, the rule enunciated in *Steelworkers v. American Mfg. Co.*, applies "when the parties *have agreed* to submit *all* questions of contract interpretation to the arbitrator." 363 U.S. at 567-68. [Emphasis added]

Subsequently, the Court observed, in *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962):

> "The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements".

If a labor agreement contains a broad no-strike clause, a claimed breach and the scope of the prohibition are proper subjects for arbitration. "The rule is that unless the parties expressly exclude a matter, the Court will conclude that they intended to submit it to arbitration."[9]

The applicable labor agreements in this case clearly spell out a broad, unequivocal prohibition which the unions violated. Section 26 contains an explicit prohibition of work stoppages concerning contractual grievances. Section 14 b., a section containing no explicit references to any other term of the agreement, prohibits all strikes, work stoppages, interruptions and impeding of work during the term of the agreement; and prohibits authorization, instigation, aid or condonation of "any such activities" by officers or representatives of the International and local unions. The *only* express contractual exception to these prohibitions are "unsuccessful efforts" by union agents to prevent and terminate wildcat strikes.

These agreements also provide for final and binding arbitration of disputes (whether raised by the Company, the Unions or employees) "as to the meaning and application of the provisions of this agreement" as well as disputes which arise out of "trouble of any kind . . . in the plant". These provisions are certainly broad enough to cover the underlying controversy herein.

The theme of federal policy that the federal courts have fashioned since *Lincoln Mills* has forcefully emphasized over and over again, the necessity of mutual and equal enforceability of contract provisions and the importance of substituting the arbitral process for the strike when a contractual

[9] *Monroe Sandler Corp. v. Livingston*, 377 F.2d 6, 9-10 (2d Cir. 1967); Cert. denied 389 U.S. 831 (1967); *Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionary Workers*, 370 U.S. 254 (1962); *H. K. Porter Co., Inc. v. Local 37, United Steelworkers of America*, 400 F.2d 691 (4th Cir. 1968); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

dispute develops over the meaning and application of the terms of the collective bargaining agreement. The decision of the Court of Appeals in this case does not adhere to these principles.

B. Federal Policy Encourages Arbitral Settlement of Industrial Disputes Through Enforcement of No-Strike Obligations

In *Boys Markets Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970), this Court recognized that a pro-arbitration policy would be frustrated unless the federal courts possessed the power to compel arbitration and enjoin breach of contract strikes, if the agreement to arbitrate the dispute could be established and if an injunction would have been proper but for *Norris-LaGuardia*. The holding was made in a factual context in which the union had engaged in a strike in furtherance of a grievance initiated by the union over the interpretation and application of certain contract provisions. The decision insured that equitable remedies were available, in the federal courts, for enforcement of arbitration agreements and their accompanying no-strike obligations. In that context, the court observed that the *Norris-LaGuardia Act* "was responsive to a situation totally different from that which exists today".[10]

§ 2 of *Norris-LaGuardia*[11] shows one of the primary concerns of Congress was to insure workers the right "to exercise actual liberty of contract" and to protect "concerted activities for the purpose of collective bargaining". In *Sinclair*[12], the employer argued that a literal application of § 4 of the Act to ban injunctions against breach of contract strikes would

[10] 398 U.S. at 250.

[11] 29 U.S.C. § 102.

[12] *Sinclair Refining Co. v. Atkinson, supra*, at 200-201.

defeat one of the primary enacting purposes. The argument that Congress intended to confer the power upon the federal courts to accommodate *Norris-LaGuardia* with § 301 purposes was rejected as "startling"[13], although the Court's opinion acknowledged that these arguments were premised on current "assessments of the prevailing circumstances of contemporary labor relations" rather than upon the literal wording of the statute written by Congress thirty years earlier.[14]

More recently, this Court expanded the *Boys Markets* holding in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). There, the Court applied the presumption of arbitrability to "safety disputes" even though such disputes were not specifically referred to in the grievance and arbitration provision of the agreement; and it enjoined the work stoppage on the basis of an implied no-strike obligation, even though § 502 of the *Labor Management Relations Act* was asserted to be a statutory grant of a right to engage in a work stoppage.[15]

We perceive particular significance in the reversal of the Court of Appeals in *Gateway* for additional reasons. In its affirmance of the District Court's injunction pending arbitration, this Court's opinion placed greater emphasis upon the union's no-strike obligations than in *Boys Markets*. In the earlier decision, the Court's main emphasis was placed upon the federal pro-arbitration policy and the duty to arbitrate, and the injunction was a remedial device to protect the

[13] Id. at 209.

[14] Id. at 201-202.

[15] Similarly, and in view of the agreement provisions herein, the respondents' reliance on § 7 of the *National Labor Relations Act* is misplaced. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80 (1953). Accord, *Monongahela Power Co. v. IBEW*, 484 F. 2d 1209 (4th Cir. 1973). *Armco Steel Corp. v. UMWA*, 505 F. 2d 1129 (4th Cir. 1974), *Cert. denied* 90 LRRM 2554 (U.S. Oct. 6, 1975).

jurisdiction of the arbitrator, rather than in the nature of specific performance of the no-strike obligation.

In its *Gateway* opinion, the Court majority again expressed its high regard for the policy favoring labor arbitration, but the main thrust of the opinion dealt with the nature of the no-strike obligation. This emphasis is demonstrated by Mr. Justice Powell's observation that separation of the no-strike obligation from the arbitration agreement presents two "analytically distinct" issues, each of which "depends on the intent of the contracting parties".[16] Arbitration, too, is a matter of contract, and the parties "are free to make that promise [to submit disputes to arbitration] as broad or as narrow as they wish . . ."[17]

> "It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Market*. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having *coterminous application*". [Emphasis added] [18]

Thus, the Court's decision contemplated that the parties, in particular factual contexts, could negate a no-strike obligation, express or implied, leaving only an agreement to arbitrate which would be insufficient to authorize a breach of contract strike injunction under *Boys Markets*.

The union in *Gateway* forcefully urged that safety disputes were excepted from the no-strike obligation by a section of

[16] 414 U.S. at 382.

[17] *United Steelworkers of America v. American Mfg. Co.* 363 U.S. at 570 (Brennan J., concurring).

[18] *Gateway Coal Co. v. United Mine Workers, supra* at 382.

the collective bargaining agreement which provided a specific procedure by which the union could close down an "unsafe" area of a mine.[19] This Court disposed of the argument thusly:

> "In any event, whether the Union properly invoked this provision is a *substantial question of contractual interpretation, and the collective bargaining agreement explicitly commits to resolution by an impartial umpire all disagreements as to the meaning and application of this agreement.*" [Emphasis added.][20]

The Court's decision considered and accepted the proposition that the disputed scope of the no-strike obligation formed a "compelling"[21] basis for favoring the availability of equitable intervention in the nature of injunctive relief to enforce a no-strike obligation.[22]

Such an arbitrable dispute would have arisen in *Gateway* not as an "underlying" grievance "over" which the work stoppage was instituted, but as a result of the work stoppage itself. Yet, the Court, below, and those other circuits which also adopted both the literal reading of § 4 of *Norris-LaGuardia* and of *Boys Markets* have identified this causal nexus between the union-initiated grievance and the work stoppage as *the only* justification supporting the jurisdiction of the federal courts to grant injunctive relief in breach of contract strikes.

A substantial error in the Appellate Court's assessment is its failure to acknowledge this Court's past recognition that § 4 of *Norris-LaGuardia* didn't invariably bar injunctive relief,

[19] Id. at 383.

[20] Id. at 384.

[21] Id. at 381.

[22] Accord, *Pilot Freight Carriers, Inc. v. Local 391 Teamsters*, 497 F. 2d 311 (4th Cir. 1974) *Cert. denied* 419 U.S. 869 (1974); *Island Creek Coal Co. v. UMWA*507 F.2d 650 (3rd Cir. 1975); *Cert. denied* 90 LRRM 2554 (U.S. Oct. 6, 1975); *Wilmington Shipping Co. v. Int'l. Longshoremen's Assn.* .... F.2d .... (4th Cir. 1974), 86 LRRM 2846, *Cert. denied* 95 S.Ct. 498 (1974).

and the significance of this Court's accommodation of § 4 and the *Railway Labor Act.* If the Court of Appeals had adopted the principles of that accommodation, it would have found that judicial enforcement of the *quid pro quo* of the arbitration agreement in the instant case would not have stripped respondent unions of their "primary weapon without substituting a reasonable alternative".[23]

In *Northwest Airlines Inc. v. Air Line Pilots Assn.*, 442 F. 2d 246, aff'd on rehearing 442 F. 2d 251 (8th Cir.), cert. denied, 404 U.S. 871 (1971), an airline sought to enjoin its pilots from honoring a picket line established by another union. The carrier contended that the refusal of its pilots to cross this picket line constituted a violation of an *implied* no-strike clause and was therefore a "minor dispute"[24] which was to be resolved pursuant to the arbitration procedures set forth in the Railway Labor Act. The District Court denied injunctive relief and an order to arbitrate, largely on the same basis as the Appellate Court in the instant case.[25]

> "The 'Minor Dispute' provision of the Railway Labor Act manifestly presumes the existence of some underlying disagreement which has to be resolved and sets forth procedures for doing so without resort to a strike.
>
> "The situation before this Court, however, does not present an underlying dispute between ALPA and NWA over which ALPA in an attempt to achieve a favorable resolution has initiated a work stoppage. The situation presented involves the work stoppage itself as the very basis of the disagreement."

[23] *Brotherhood of Railway Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U.S. 30, 40 (1957).

[24] The definition of a "minor dispute" under the Railway Labor Act is virtually identical to the definition of an arbitrable grievance under the collective bargaining contract here. Minor disputes are defined as: "grievances or other differences arising out of the application or interpretation of an existing collective bargaining argeement . . ."

[25] 325 F. Supp. 994, 997 (D.Minn. 1970); App.A. pp. 7a-9a.

The Eighth Circuit reversed, ordered arbitration and enjoined the work stoppage. The Court held:[26]

> ". . .[W]e feel that NWA is correct in arguing that the AFPA contract *can arguably be interpreted to prohibit the Association from instructing its members to respect the BRAC picket lines.* The dispute is, thus, in our view, a minor one which must be submitted to the System Board of Adjustment". [Emphasis added]

The fact that the decision arose under the Railway Labor Act does not impair its applicability to the present case; inasmuch as this Court, in *Boys Markets*, turned to its earlier decision in *Chicago River* as direct support for its holding that the issuance of an injunction in cases such as this does not offend the policies of the *Norris-LaGuardia Act.*[27]

II. The District Court had authority under § 301 to enjoin the sympathy strike conduct pending arbitration of the contractual dispute involved.

Current federal labor policy, under § 301, places the force of law behind labor-management agreements. The District Court would have been fully warranted in asserting its jurisdiction to specifically enforce the unequivocal no-strike obligation expressed in the labor agreements here. This Court has noted that § 301 empowers a federal court to enjoin violations of a contractual duty not to strike[28] and exercise of such jurisdiction is firmly grounded in the Congressional policy embodied in § 203(d) of the Labor-Management Relations Act.[29]

The Second Circuit's holding that the grievance must be the underlying cause of the stoppage construes *Boys Markets* too

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[26] 442 F. 2d at 248

[27] 398 U.S. at 252

[28] *Gateway Coal Co. v. United Mine Workers*, *supra*, at 381.

[29] 29 U.S.C. § 173(d).

literally. First, it fails to consider the particular factual context in which this Court's decision was rendered. Second, "it makes little sense to argue that because the work stoppage precipitated the dispute, it was not a work stoppage 'over' a grievance which the parties were contractually bound to arbitrate". *Valmac Industries Inc.*, 519 F.2d 263 (8th Cir. 1975), petition for cert. filed (U.S. Oct. 31, 1975; No. 75-647). This is especially true where, as here, the Company offered to arbitrate the union sympathy strike plan before the stoppage occurred. Finally, in its narrow reading of the *Boys Markets* holding, the Appellate Court has erroneously adopted a *double standard* of arbitrability which presumes union or employee initiated grievance claims *are* arbitrable, but employer initiated grievance claims over disputed contractual provisions *are not.* Its opinion is replete with indications that union-induced work stoppages are enjoinable only when the stoppage is *over* a contractual grievance initiated by the Union or employees.

This double standard of arbitrability produces different results depending on the type of § 301 litigation involved. In an employer's suit for damages under § 301, a presumption *in favor* of arbitrability is applied which would require a stay pending arbitration; but in an employer's suit for equitable relief under the same statute, a presumption *against* arbitrability is applied which results in denial of injunctive relief. Such a biased approach cannot be justified under any principle of fundamental fairness or mutuality of remedy.

Moreover, in *Boys Markets* and *Gateway*, this Court specifically embraced the presumption in favor of arbitrability, in the context of an employer's suit for injunctive relief, and found "the policy reasons favoring the availability of injunctive relief . . . equally compelling" in damage and injunctive actions based on breach of the no-strike obligation.[30]

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[30] 414 U.S. at 381, fn. 14.

Denial of the specific performance remedy fosters disregard for express no-strike obligations and strong incentives against participating in meaningful bargaining are encouraged. The damage done to the policies embodied in § 301 is greater if relief is denied than if it is granted. Currently, one-third of all strikes, annually, are breach of contracts strikes[31]. In 1971, such strikes accounted for a higher percent of all strikes than strikes which occurred during negotiations of first labor contracts[32]. The institution of collective bargaining, so critical to the core purposes of national labor policy, is not served by this magnitude of disrespect for collectively bargained no-strike obligations.

The opinions of the Court of Appeals, and those other circuits in accord, indicate less than healthy respect for the institution of collective bargaining in the expression of "concern" that specific performance of the no-strike obligation in the sympathy strike context herein will subject virtually all strikes to the judicial intervention denied by § 4 *Norris-LaGuardia*.

The scope of the agreement to arbitrate and the contractual no-strike obligation is a matter of contract. The parties may expressly negate the obligation to arbitrate certain labor disputes; or agree to a broad mandatory arbitration, yet expressly negate any implied no-strike obligation; or provide a permissive rather than mandatory duty to arbitrate and contractually preserve a right to strike or lockout. Whatever the parties negotiate, the scope of their obligations to one another, arising out of the contractual relationship, "depends on the intent of the contracting parties"[33]. The obvious point is that

[31] U.S. Department of Labor Bulletin No. 1777, "Analysis of Work Stoppages 1971", at 5, 23-24 (1973).

[32] Idem

[33] *Gateway Coal Co. v. United Mine Workers, supra,* at 382; Cf. *Standard Food Products Corp. v. Brandenburg,* 436 F.2d 964, 965 (2nd Cir. 1970); *Morning Telegraph v. Powers,* 450 F.2d 97 (2nd Cir. 1971).

an injunction cannot issue absent a sufficient contractual predicate, for, otherwise, the sacrifice of *Norris-LaGuardia* rights is without justification. By leaving to the courts, under § 301, the task of merely enforcing that to which the parties agreed, Congress manifested the federal regulatory policy which the courts are to implement. Those who urge that it is for Congress and not the judiciary to reach this result have failed, we feel, to absorb the full impact of *Boys Markets*[34].

Requiring the parties to submit the merits of the claimed breach of contract to their own dispute resolving procedures encourages utilization of those procedures. Injunctive relief, conditioned upon prompt arbitration of the dispute, does not nullify the union's right to establish or honor a picket line; it "only suspends the exercise of the right until its existence is established by an arbitrator's decision." NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d at 324. "The assurance of swift and effective relief provides incentive to eschew economic weapons in favor of binding arbitration and no-strike clauses". *Arnold Co. v. Carpenters Union,* 417 U.S. 12, 18 (1974).

A narrow inquiry into whether a strike in breach of contract *was caused* by an arbitrable matter, based on an assumption that only an order requiring arbitration of the precipitating cause of the strike can encourage arbitration, misses the point. What can be more fundamental to a collective bargaining relationship than the scope of a no-strike obligation! Should not the parties be required to resort to the settlement procedures of their relationship to determine the scope of their bargain! In fact, if encouraging and promoting labor arbitration is one of the goals of Section 301, its utilization is fully encouraged when ordered in those cases where the arbitrable dispute may not be the precipitating cause of the work stoppage; but, rather, the work stoppage it-

[34] 398 U.S. at 240-242.

self is of questionable validity under the bargaining agreement. A dispute of that nature goes to the very heart of the collective bargaining relationship and labor arbitration would seem particularly well suited to resolve the difficulty.

Because the *Boys Markets* remedy is so deeply anchored as an aid to arbitral jurisdiction, judicial relief in the nature of specific performance of no-strike obligations without referring the merits of the dispute to arbitration is not warranted. In this context, therefore, *Norris-LaGuardia* retains its vitality; depriving courts of authority to sepcifically enforce no-strike obligations, where the risk of judicial intervention into the merits of the labor dispute in injunction proceedings is great because the parties have deprived arbitration of jurisdiction to resolve the merits of that dipute.

Conclusion

For the reasons stated, it is respectfully urged that the judgment of the Court of Appeals for the Second Circuit should be reversed with instructions to direct arbitration of the issue of whether the Unions' conduct violated the terms of the collective bargaining agreement and to enjoin any resumption of the sympathy strike and work stoppage pending arbitration.

Respectfully submitted,

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